



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Hex Industries, Inc., Avel Corporation, and
Cosmodyne, Inc.

File: B-243867

Date: August 30, 1991

Robert A. Brunette, Esq., for the protester.
Lenore K. Strakowsky, Esq., Department of the Navy, for the
agency.
Edwin Rodriguez, John W. Van Schaik, Esq., and John Brosnan,
Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest that agency violated protesters' proprietary rights by disclosing in a solicitation drawings allegedly containing proprietary data submitted by the protesters under a prior solicitation is dismissed. Since the agency disclosed the information in competitive solicitations in 1980, 1982 and 1988 and made its position clear in denying an agency-level protest that it did not view the data as proprietary and the protesters failed to further pursue their contentions; it is not appropriate for the General Accounting Office to review the matter at this late date.

DECISION

Hex Industries, Inc., Avel Corporation, and Cosmodyne, Inc. protest the terms of request for proposals (RFP) No. N68335-90-R-0383, issued by the Navy for aircraft and liquid oxygen converter purge units. The protesters contend that the solicitation improperly provides for the release of drawings which allegedly contain information proprietary to them.^{1/}

We dismiss the protest.

The RFP, issued August 27, 1990, required manufacture of the purge units in accordance with drawings on data lists 3447AS100 and 1104AS100 and other specifications. Cosmodyne protested to the Navy that the disclosure of certain drawings

^{1/} Cosmodyne is a wholly-owned subsidiary of Avel and Hex is an affiliate.

included on the data lists violated its proprietary rights. The Navy denied that protest and Hex, Avel, and Cosmodyne protested to this Office on May 1, 1991.

The protesters argue that the solicitation discloses proprietary technical data which they furnished to the Navy under a 1974 contract for the purge units. According to the protesters, the drawings they provided to the Navy under the 1974 contract had proprietary legends and were only to be used by the agency for emergency manufacture, repair and overhaul and not in competitive procurements. The protesters argue that the Navy's disclosure of the drawings violates the Trade Secrets Act, 18 U.S.C. § 1905 (1988); the procurement integrity provisions of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 423(b) (1988 and Supp. I 1989); and California trade secrets laws and request that we recommend that the Navy award the contract to one of the protesters or reissue the solicitation consistent with their proprietary rights.

The Navy argues that the RFP does not disclose proprietary data since the drawings in question were developed without reference to drawings which Avel, Hex, or Cosmodyne claim are proprietary. The agency also argues that some of the drawings for which the protesters claim proprietary rights were not marked proprietary and that some allegedly proprietary information is publicly available and was listed in the purchase description in the solicitation under which the protesters originally submitted the data. Finally, the agency maintains that the protesters have waived their right to protest the disclosure of the allegedly proprietary information because they failed to pursue protests after disclosure of the information in competitive solicitations issued in 1980, 1982, and 1988.

We consider claims of misuse of proprietary data in order to provide some protection against the unauthorized disclosure of data in a solicitation and to prevent government liability for damages resulting from the disclosure. Data Gen. Corp., 55 Comp. Gen. 1040 (1976), 76-1 CPD ¶ 287; Ingersoll-Rand Co., B-236391, Dec. 5, 1989, 89-2 CPD ¶ 517. Thus, in appropriate circumstances, where it is clear that the government's use of proprietary data or trade secrets in a solicitation violates a firm's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the firm or, if possible, cancel the solicitation and resolicit without using the data. Data Gen. Corp., 55 Comp. Gen. 1040, supra; NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649.

In this case, we agree with the Navy that Hex, Avel, and Cosmodyne waived their objections to the disclosure of their allegedly proprietary drawings. In this respect, since 1974

when Avel submitted the allegedly proprietary drawings to the government, the Navy has released those drawings in competitive solicitations on three separate occasions, in 1980, 1982, and 1988. The 1980 solicitation, RFP No. N00140-81-R-2099, included most of the drawings which the protesters now argue are proprietary. In letters dated February 27 and April 3, 1981, Avel protested to the contracting officer that the Navy was using drawings in the solicitation in a manner that violated restrictions on their face and that the design of the purge units called for by the solicitation was proprietary to Avel. By letters dated March 25 and April 29, the contracting officer denied the protest and specifically rejected Avel's contention that the drawings submitted under the 1974 contract contained proprietary information.

Although a contract under the 1980 solicitation was awarded to Avel as a result of that firm's winning the competition, the allegedly proprietary information included in the solicitation already had been disclosed to the protesters' competitors when the solicitation was issued. Moreover, as a result of the contracting officer's response to Avel's protest, Avel was aware of the agency's position that the firm did not have proprietary rights in the data but Avel did not pursue the matter further.

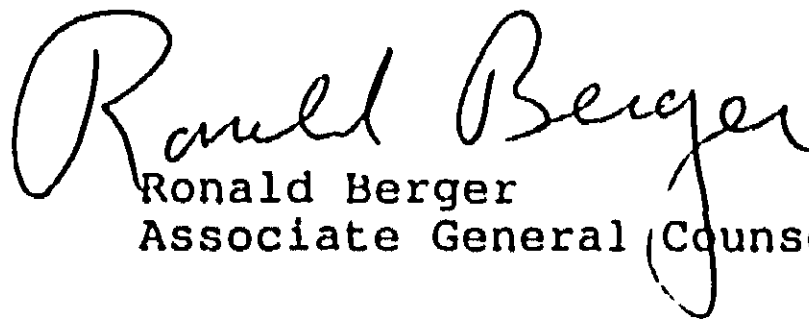
More important, the Navy released the same drawings in invitation for bids (IFB) No. N00140-83-B-0091. Although Avel also won that competition and was awarded a contract, once again Hex, Avel and Cosmodyne acquiesced in the disclosure of the allegedly proprietary drawings since none of those firms protested the inclusion of the allegedly proprietary data in the IFB. Finally, in 1988, Cosmodyne protested to the contracting officer that another solicitation issued by the Navy, RFP No. N00383-87-R-0969, included drawings and a purge unit design that were proprietary to Cosmodyne. Again, although the Navy canceled the solicitation for reasons unrelated to Cosmodyne's protest, the solicitation, including the drawings, had already been issued and Cosmodyne failed to pursue its contention regarding the allegedly proprietary design and drawings.

The value of proprietary information lies in its possession uniquely by the owner; once such information becomes public knowledge, its value and status as proprietary information are lost. Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 CPD ¶ 305. Since 1980, the Navy has repeatedly released the drawings which the protesters argue are proprietary. Although the agency has made very clear its belief that the data is not proprietary, until now the protesters have not pursued their claim concerning the allegedly proprietary data. While it is true that the protesters received the award under two of the earlier solicitations, in neither of those cases did the award

signify acquiescence by the agency to the protesters' position concerning the data since the awards were made as the result of competition and, in the one instance, where a protest was filed, the agency denied the protest prior to making the award. Further, in both instances, the data was exposed in competitive solicitations. Under the circumstances, we conclude that it is not appropriate for the protesters at this late date to raise the matter with our Office. In our view, they have waived their right to bring the matter here. See id.; Litton Applied Technology, B-227090; B-227156, Sept. 3, 1987, 87-2 CPD ¶ 219.

The protesters argue that we should not apply the equitable doctrine of waiver to allow a further disclosure of the drawings since the Navy acted improperly by, for instance, failing to timely challenge the proprietary markings when the drawings were submitted in 1974. In our view, it was the responsibility of Hex, Avel, and Cosmodyne to protect their allegedly proprietary drawings and, as a result of their failure to do so, those drawings no longer have a value as proprietary information. Under the circumstances, no purpose would be served in canceling the current solicitation or awarding a sole-source contract to the protesters. The appropriate remedy in cases such as this, where the protester has waived its objections to disclosures of alleged proprietary data in earlier solicitations, is administrative settlement or a judicial action against the government for damages. Del Mar Avionics--Recon., B-231124.2, Feb. 9, 1989, 89-1 CPD ¶ 131.

The protest is dismissed.


Ronald Berger
Associate General Counsel